Post-*Booker* Sentencing—Selected Issues from Appellate Case Law

Jefri Wood
Federal Judicial Center
July 2006

This Outline will use the term "departure" only in reference to a departure from the guideline range as calculated under the U.S. Sentencing Guidelines. The terms "variance," "non-Guidelines sentence," or "sentence outside the Guidelines" will refer to a sentence that is different from the applicable advisory guideline range—which may already include a departure—based on the application of other § 3553(a) factors. For purposes of this outline, it is assumed that readers are familiar with the basic holding and effect of *U.S. v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), as well as *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). We do not include "cert. denied" citations.

I. Sentencing After Booker—General Procedure

A. First Calculate the Advisory Guideline Range as Before

In light of *Booker*'s directive to "consider" or "consult" the Guidelines, most circuits have developed a two-stage approach to post-*Booker* sentencing: calculate the applicable guideline range as before, including a determination of whether a departure from the guideline range is appropriate; then examine the § 3553(a) factors to determine whether a sentence outside of the final guideline range is warranted. As the Fourth Circuit put it, "a district court shall first calculate (after making the appropriate findings of fact) the range prescribed by the guidelines. Then, the court shall consider that range as well as other relevant factors set forth in the guidelines and those factors set forth in § 3553(a) before imposing the sentence." In remanding the case for resentencing, the court added that "the district court must consider the correct guideline range before imposing a sentence on remand," and that "reasonableness depends not only on an evaluation of the actual sentence imposed but also the method employed in determining it." *U.S. v. Hughes*, 401 F.3d 540, 546–47, 556 & n.14 (4th Cir. 2005).

The Eighth Circuit also held that "the sentencing court must first determine the appropriate guidelines sentencing range . . . . Once the applicable range is determined, the court should then decide if a traditional departure is appropriate under Part K and/or §4A1.3 of the Federal Sentencing Guidelines. Those considerations will result in a 'guidelines sentence.' Once the guidelines sentence is determined, the court shall then consider all other factors set forth in § 3553(a) to determine whether to impose the sentence under the guidelines or a non-guidelines sentence." *U.S. v. Haack*, 403 F.3d 997, 1002–03 (8th Cir. 2005).

Most of the other circuits have reached a similar conclusion. *See, e.g.*, *U.S. v. Jimenez-Beltre*, 440 F.3d 514, 518–19 (1st Cir. 2006) (en banc) ("we find very helpful the district court's sequential determination of the guideline range, including any proposed departures, followed by the further determination whether other factors identified by either side warrant an ultimate sentence above or below the guideline range"); *U.S. v.*

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to develop and conduct education programs for judicial branch employess. The views expressed are those of the author and not necessarily those of the Federal Judicial Center.

Talley, 431 F.3d 784, 786 (11th Cir. 2005) ("First, the district court must consult the Guidelines and correctly calculate the range provided by the Guidelines. . . . Second, the district court must consider [the other § 3553(a)] factors to determine a reasonable sentence."); *U.S. v. Mares*, 402 F.3d 511, 518–19 (5th Cir. 2005) ("The Guideline range should be determined in the same manner as before *Booker*/*Fanfan*."); *U.S. v. Crosby*, 397 F.3d 103, 111–12 (2d Cir. 2005) ("In order to fulfill this statutory duty to 'consider' the Guidelines, a sentencing judge will normally have to determine the applicable Guidelines range. A judge cannot satisfy this duty by a general reference to the entirety of the Guidelines Manual, followed by a decision to impose a 'non-Guidelines sentence.' . . . The applicable Guidelines range is normally to be determined in the same manner as before."). *Cf. U.S. v. Menyweather*, 447 F.3d 625, 630 (9th Cir. 2006) (in reviewing sentence under *Booker*, "the first question is whether the district court began with the correct Guidelines sentence"); *U.S. v. Cooper*, 437 F.3d 324, 330 (3d Cir. 2006) ("trial court must calculate the correct guidelines range").

See also U.S. v. Buchanan, 449 F.3d 731, 734 (6th Cir. 2006) ("In our view, the court demonstrated a model approach to sentencing in the aftermath of *Booker*. The judge properly calculated the guidelines range, then carefully considered the appropriateness of that range as applied to the defendant before him in light of the concerns encompassed by the statutory factors. Balancing competing interests, goals and individual characteristics, the court found the recommended guidelines range to be appropriate and chose to sentence Buchanan at the bottom of that range to 'impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth' in the § 3553(a)(2) factors. 18 U.S.C. § 3553(a).").

The Seventh Circuit, while following the same general procedure, has concluded that the concept of "'departures' has been rendered obsolete by our recent decisions applying *Booker*. It is now clear that after *Booker* what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-*Booker* decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory. . . . Now, instead of employing the pre-*Booker* terminology of departures, we have moved toward characterizing sentences as either fitting within the advisory guidelines range or not." *U.S. v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005). *See also U.S. v. Laufle*, 433 F.3d 981, 986-87 (7th Cir. 2006) ("Now that *Booker* has rendered the Guidelines advisory and district courts have much broader authority to sentence outside the recommended range, departures are beside the point.").

B. Guideline Range Must Be Correctly Calculated

Several circuits have stressed that the guidelines must be correctly calculated—an inaccurate guideline range is inherently unreasonable and, barring harmless error, requires a remand without reaching the question of whether the sentence was reasonable. "The duty to remand all sentences imposed as a result of an incorrect application of the guidelines exists independently of whether we would find the resulting sentence reasonable under the standard of review announced in *Booker.* As the Supreme Court has recognized in the context of departures, § 3742(f) does not provide for a reviewing court to affirm a sentence based on its overall reasonableness when it was imposed as a result of an incorrect application of the guidelines. Instead, § 3742(f)(1) commands the reviewing court to remand a case where the district court incorrectly applied the guidelines." *U.S. v. Mashek*,

406 F.3d 1012, 1015 (8th Cir. 2005). *See also U.S. v. Cantrell*, 433 F.3d 1269, 1280 (9th Cir. 2006) ("we hold that a material error by the district court in calculating the applicable Guidelines range is grounds for resentencing, just as it was before *Booker*," citing § 3742(a) and (f)).

The Tenth Circuit similarly concluded that "the reasonableness standard of review set forth in *Booker* necessarily encompasses both the reasonableness of the length of the sentence, as well as the *method* by which the sentence was calculated. . . . A sentence cannot, therefore, be considered reasonable if the manner in which it was determined was unreasonable, i.e., if it was based on an improper determination of the applicable Guidelines range. . . . [W]hen the district court errs in applying the Guidelines, . . . we must remand—without reaching the question of reasonableness—unless the error is harmless." *U.S. v. Kristl*, 437 F.3d 1050, 1054–55 (10th Cir. 2006). *Accord U.S. v. Hughes*, 401 F.3d 540, 556 & n.14 (4th Cir. 2005) (in remanding a case for resentencing, court stated that "the district court must consider the correct guideline range before imposing a sentence on remand," and "reasonableness depends not only on an evaluation of the actual sentence imposed but also the method employed in determining it").

See also U.S. v. Robinson, 433 F.3d 31, 35 (1st Cir. 2005) ("so far as the Guidelines bear upon the sentence imposed, the court's calculation must be correct"); *U.S. v. Cooper*, 437 F.3d 324, 330 (3d Cir. 2006) ("In consideration of the § 3553(a) factors, a trial court must calculate the correct guidelines range applicable to a defendant's particular circumstances."); *U.S. v. Price*, 409 F.3d 436, 443 (D.C. Cir. 2005) (although Guidelines are advisory under *Booker*, "when the District Court purports to apply the Guidelines it must do so without error"); *U.S. v. Crawford*, 407 F.3d 1174, 1178–79 (11th Cir. 2005) ("[A]s was the case before *Booker*, the district court must calculate the Guidelines range accurately. A misinterpretation of the Guidelines by a district court 'effectively means that [the district court] has not properly consulted the Guidelines.'"); *U.S. v. Angeles-Mendoza*, 407 F.3d 742, 754 (5th Cir. 2005) ("Even though *Booker* renders the guidelines advisory, a sentencing court must first arrive at the proper guideline calculation before deciding which sentence to impose."); *U.S. v. Skoczen*, 405 F.3d 537, 549 (7th Cir. 2005) ("Even under an advisory regime, if a district court makes a mistake in calculations under the Guidelines, its judgment about a reasonable sentence would presumably be affected by that error and thus . . . remand would be required just as before."); *U.S. v. Hazelwood*, 398 F.3d 792, 801 (6th Cir. 2005) ("regardless of whether the Guidelines are mandatory or merely advisory, district courts are required by statute to consult them, and . . . a district court's misinterpretation of the Guidelines effectively means that it has not properly consulted the Guidelines").

Some circuits have specified that an accurate calculation of the advisory guideline range includes the correct determination of any departures. The Eleventh Circuit remanded a case, in part, because the sentencing court "committed several legal errors in its decision that a downward departure was warranted. We cannot presume that, in the absence of those errors, the district court would have decided that a downward departure was warranted in calculating an advisory guideline range. We remand this case to allow the district court to revisit the downward departure issue under the correct legal standards. . . . Because district courts are required under *Booker* to consult the Guidelines, and because true consultation cannot be based on an erroneous understanding of the Guidelines, the district court erred in failing to consult properly the Guidelines." *U.S. v.*

Crawford, 407 F.3d 1174, 1182–83 (11th Cir. 2005) (at least two of four factors used to justify departure were impermissible grounds). *See also U.S. v. Mix*, 450 F.3d 375, 380 (9th Cir. 2006) ("After *Booker*, the departure Guidelines (U.S.S.G. § 5K1 and § 5K2) remain operative. An accurate guideline range calculation may still properly require consideration and correct application of the departure Guidelines."); *U.S. v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005) ("Because even under the post-*Booker* sentencing regime, calculation of a correct Guideline sentencing range will normally be part of the process of determining an appropriate sentence, . . . it remains important in this case to review the correctness of the District Court's determination that a Guidelines sentence for Selioutsky could include a departure for extraordinary family circumstances. . . . An error in determining the applicable guideline range or the availability of departure authority would be the type of procedural error that could render a sentence unreasonable under *Booker*.").

In a pre-*Booker* case remanded for resentencing, the Second Circuit cautioned that a departure cannot make up for an incorrectly calculated guideline range. A significant error in calculating the guideline range in this case "might well have affected the ultimate sentence, even though the district court applied a downward departure. . . . Indeed, such an 'appreciable influence' could obtain 'even under the discretionary sentencing regime that will govern [a] resentencing,' because the applicable Guidelines range may serve as 'a benchmark or a point of reference or departure' as the court exercises its expanded discretion." The court emphasized that it was not holding that every incorrectly calculated guideline sentence required remand; rather, it was the significant size of the error here that called into question the reasonableness of the sentence imposed. *U.S. v. Canova*, 412 F.3d 331, 356 (2d Cir. 2005) (citations omitted).

C. Consideration of § 3553(a) Factors

The appellate courts generally do not require district courts to specify how each § 3553(a) factor was taken into account in sentencing. Just how precisely a court must demonstrate consideration of the § 3553(a) factors seems to depend on the circumstances, such as whether specific factors are raised by the parties or a non-Guidelines sentence is imposed. For "routine' sentences, a general reference to the § 3553(a) factors seems to suffice. "When the defendant has not raised any substantial contentions concerning non-Guidelines § 3553(a) factors and the district court imposes a sentence within the Guidelines range, our post-*Booker* precedents do not require the court to explain on the record how the § 3553(a) factors justify the sentence." *U.S. v. Lopez-Flores*, 444 F.3d 1218, 1222 (10th Cir. 2006). *See also U.S. v. Simpson*, 430 F.3d 1177, 1186–87 (D.C. Cir. 2005) (District courts need "not specifically refer to *each* factor listed in § 3553(a). . . . When a defendant has not asserted the import of a particular § 3553(a) factor, nothing in the statute requires the court to explain sua sponte why it did not find that factor relevant to its discretionary decision."). *Cf. U.S. v. Scott*, 426 F.3d 1324, 1329 (11th Cir. 2005) ("We now . . . squarely hold that nothing in *Booker* or elsewhere requires the district court to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors. . . . [T]he district court explicitly acknowledged that it had considered Scott's arguments at sentencing and that it had considered the factors set forth in § 3553(a). This statement alone is sufficient in post-*Booker* sentences.").

The Seventh Circuit stated that "the sentencing judge can discuss the application of the statutory factors to the defendant not in checklist fashion but instead in the form of an adequate statement of the judge's reasons, consistent with section 3553(a), for thinking the sentence that he has selected is indeed appropriate for the particular defendant. . . . However, the farther the judge's sentence departs from the guidelines sentence (in either direction—that of greater severity, or that of greater lenity), the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed. . . . But although the judge must therefore articulate the factors that determined the sentence that he has decided to impose, his duty 'to consider' the statutory factors is not a duty to make findings . . . . Explicit factfinding *is* required, however, if, though only if, contested facts are material to the judge's sentencing decision. A judge who thinks that a particular contested characteristic of a defendant may be decisive to the choice of sentence, such as the defendant's mental or emotional state, must resolve the factual issue in the usual way, that is, by making findings on the basis of evidence, just as he would have to do in applying the sentencing guidelines if, as in the present case, the calculation of the guidelines sentence depends on the resolution of a factual dispute." *U.S. v. Dean*, 414 F.3d 725, 729–30 (7th Cir. 2005). *See also U.S. v. Gatewood*, 438 F.3d 894, 896 (8th Cir. 2006) ("For this court to properly carry out the appellate review mandated by *Booker*, it is essential that the district court explain the reasons why it has imposed a sentence outside the guidelines sentencing range in a particular case. *See* 18 U.S.C. § 3553(c)(2) . . . . We do not require a rote recitation of each § 3553(a) factor, but the court should explain both the decision to vary and the extent of the variance. . . . 'Sentences varying from the guidelines range . . . are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a). . . . How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed.'" (quoting *U.S. v. Johnson*, 427 F.3d 423, 426–27 (7th Cir. 2005))).

The Third Circuit stressed that the record "must demonstrate the trial court gave meaningful consideration to the § 3553(a) factors. . . . The court need not discuss every argument made by a litigant if an argument is clearly without merit. . . . Nor must a court discuss and make findings as to each of the § 3553(a) factors if the record makes clear the court took the factors into account in sentencing. . . . Nor will we require district judges to routinely state by rote that they have read the *Booker* decision or that they know the sentencing guidelines are now advisory. On the other hand, a rote statement of the § 3553(a) factors should not suffice if at sentencing either the defendant or the prosecution properly raises 'a ground of recognized legal merit (provided it has a factual basis)' and the court fails to address it. . . . There are no magic words that a district judge must invoke when sentencing, but the record should demonstrate that the court considered the § 3553(a) factors and any sentencing grounds properly raised by the parties which have recognized legal merit and factual support in the record." *U.S. v. Cooper*, 437 F.3d 324, 329–32 (3d Cir. 2006)). *Cf. U.S. v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006) ("the district court must more thoroughly articulate its reasons when it imposes a non-Guidelines sentence than when it imposes a sentence under authority of the Sentencing Guidelines. . . . These reasons should be fact-specific and consistent with the sentencing factors enumerated in section 3553(a).").

Other circuits will look to the record as a whole and do not require "that a sentencing judge *precisely identify* either the factors set forth in § 3553(a) or specific arguments bearing on the implementation of those factors in order to comply with her duty to consider all the § 3553(a) factors along with the Guideline range. . . . Consideration of the § 3553(a) factors is not a cut-and-dried process of factfinding and calculation; instead, a district judge must contemplate the interplay among the many facts in the record and the statutory guideposts." *U.S. v. Fernandez*, 443 F.3d 19, 29 (2d Cir. 2006). *See also U.S. v. Eura*, 440 F.3d 625, 632 (4th Cir. 2006) ("To establish the reasonableness of a sentence, a district court need not explicitly discuss every § 3553(a) factor on the record. . . . Rather, the record must reflect that the court adequately and properly considered the § 3553(a) factors."); *U.S. v. Knows His Gun*, 438 F.3d 913, 918 (9th Cir. 2006) (requirement to consider § 3553(a) factors "does not necessitate a specific articulation of each factor separately, but rather a showing that the district court considered the statutorily-designated factors in imposing a sentence"); *U.S. v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006) ("the sentencing judge must consider the list of sentencing factors articulated in 18 U.S.C. § 3553(a). . . . Such consideration, however, need not be evidenced explicitly."). *Cf. U.S. v. Alli*, 444 F.3d 34, 41 (1st Cir. 2006) (in accepting "admittedly terse" explanation of § 3553(a) factors, stating "we do not fault the judge for not speaking further about the § 3553(a) factors, given that none were raised for his consideration and, in his independent judgment, none were worthy of further discussion").

The Ninth Circuit emphasized the importance of distinguishing between departures and non-guidelines sentences. "[I]it is both important and legally necessary under 18 U.S.C. § 3553(a) and under *Booker* that the district court conduct parallel analyses—first employing the Guidelines, and then considering non-guideline sentencing factors under § 3553(a). . . . Because the scope of review differs depending upon the sentencing methodology employed by the district court, it is important that district courts clearly and carefully differentiate between the findings and conclusions as regards the application of the Guidelines, and the findings and conclusions as regards the application of non-Guidelines factors pursuant to 18 U.S.C. § 3553(a)." *U.S. v. Mix*, 450 F.3d 375, 382 (9th Cir. 2006).

D. Reasonableness of Sentence Within Guideline Range

1. "Presumptively Reasonable"

The Eighth Circuit appears to have been the first appellate court to hold that a sentence within the advisory guideline range "is presumptively reasonable" if it was properly calculated and the sentencing court considered the other § 3553(a) factors. *U.S. v. Lincoln*, 413 F.3d 716, 717–18 (8th Cir. 2005).

The Seventh Circuit analyzed the tension between *Booker*'s holding that the Guidelines are advisory rather than mandatory with the directive to continue to "consult th[e] Guidelines and take them into account when sentencing." The court held that "the best way to express the new balance . . . is to acknowledge that any sentence that is properly calculated under the Guidelines is entitled to a presumption of reasonableness. . . . The defendant can rebut this presumption only by demonstrating that his or her sentence is unreasonable when measured against the factors set forth in § 3553(a)." *U.S. v. Mykytiuk*, 415 F.3d 606, 607–08 (7th Cir. 2005).

The Fourth, Fifth, Sixth, and Tenth Circuits have also concluded that a sentence within a properly calculated guideline range is presumptively reasonable. *See U.S. v. Kristl,* 437 F.3d 1050, 1054–55 (10th Cir. 2006) (per curiam) (largely following reasoning of *Mykytiuk* and emphasizing that review for reasonableness "necessarily encompasses both the reasonableness of the length of the sentence, as well as the *method* by which the sentence was calculated. . . . A sentence cannot, therefore, be considered reasonable if the manner in which it was determined was unreasonable, i.e., if it was based on an improper determination of the applicable Guidelines range."); *U.S. v. Green,* 436 F.3d 449, 457 (4th Cir. 2006) ("the district court is given some latitude to tailor a particular sentence to the circumstances without discarding the overarching guidelines and policies. But we agree with the Seventh Circuit . . . that a sentence imposed 'within the properly calculated Guidelines range . . . is presumptively reasonable.'"); *U.S. v. Williams,* 436 F.3d 706, 708 (6th Cir. 2006) ("We now join several sister circuits in crediting sentences properly calculated under the Guidelines with a rebuttable presumption of reasonableness. Such a presumption comports with the Supreme Court's remedial decision in *Booker*."); *U.S. v. Alonzo,* 435 F.3d 551, 555 (5th Cir. 2006) ("We agree with our sister circuits that have held that a sentence within a properly calculated Guideline range is presumptively reasonable," which is similar to the "great deference" to be afforded a properly reached sentence as directed by an earlier opinion.).

The Eleventh Circuit has not ruled on whether a sentence within the advisory guideline range may be presumed reasonable. In holding that such a sentence is not *per se* reasonable, it did state that "ordinarily we would expect a sentence within the Guidelines range to be reasonable. After *Booker,* our ordinary expectation still has to be measured against the record, and the party who challenges the sentence bears the burden of establishing that the sentence is unreasonable in the light of both that record and the factors in section 3553(a)." *U.S. v. Talley,* 431 F.3d 784, 788 (11th Cir. 2005).

Some circuits have pointed out that, while a Guidelines sentence is afforded a presumption of reasonableness, a sentence outside of the guideline range is not presumptively *un*reasonable. Although the presumption of reasonableness "seems to imply some sort of elevated stature to the Guidelines, it is in fact rather unimportant. *Williams* does not mean that a sentence outside of the Guidelines range—either higher or lower—is presumptively *un*reasonable. It is not. *Williams* does not mean that a Guideline sentence will be found reasonable in the absence of evidence in the record that the district court considered all of the relevant section 3553(a) factors. A sentence within the Guidelines carries with it no implication that the district court considered the 3553(a) factors if it is not clear from the record . . . . Moreover, *Williams* does not mean that a sentence within the Guidelines is reasonable if there is no evidence that the district court followed its statutory mandate to 'impose a sentence sufficient, but not greater than necessary,' to comply with the purposes of sentencing in section 3553(a)(2)." *U.S. v. Foreman,* 436 F.3d 638, 643–44 & n.1 (6th Cir. 2006). *See also U.S. v. Moreland,* 437 F.3d 424, 433–34 (4th Cir. 2006) ("A sentence that falls within the properly calculated advisory guideline range is entitled to a rebuttable presumption of reasonableness. . . .This does not mean, however, that a variance sentence is presumptively unreasonable. Such a ruling would transform an 'effectively advisory' system, . . . into an effectively mandatory one. Rather, in reviewing a variance sentence, this court must consider in light of the factors enumerated in § 3553(a) and any relevant guideline provisions—whether the district court acted rea-

sonably with respect to (1) the imposition of a variance sentence, and (2) the extent of the variance."). *Cf. U.S. v. Myers*, 439 F.3d 415, 417 (8th Cir. 2006) ("it does not follow that a sentence outside the guidelines range is unreasonable").

Note that one appellate court has remanded a within-range sentence. Such a sentence "is presumed reasonable; only highly unusual circumstances will cause this court to conclude that the presumption has been rebutted. But a number of circumstances make this case highly unusual," including a significantly lower sentence given to a somewhat more culpable coconspirator and the lack of a §5K1.1 motion even though defendant was the first conspirator to plead guilty and cooperated fully with the government. *U.S. v. Lazenby*, 439 F.3d 928, 933–34 (8th Cir. 2006) (remanding sentence for codefendant Goodwin).

2. Sentence Within Guideline Range Neither Reasonable Per Se Nor Entitled to Presumption of Reasonableness

The Second Circuit "decline[d] to establish any presumption, rebuttable or otherwise, that a Guidelines sentence is reasonable. . . . Although the Guidelines range should serve as 'a benchmark or a point of reference or departure,' . . . for the review of sentences, as well as for their imposition, we examine the record as a whole to determine whether a sentence is reasonable in a specific case. Accordingly, we do *not* hold that a Guidelines sentence, without more, is 'presumptively' reasonable." *U.S. v. Fernandez*, 443 F.3d 19, 27–28 (2d Cir. 2006). *Accord U.S. v. Jimenez-Beltre*, 440 F.3d 514, 516–18 (1st Cir. 2006) (en banc) (Guidelines entitled to "substantial weight," but court rejects presumption of reasonableness: "Although making the guidelines 'presumptive' or 'per se reasonable' does not make them mandatory, it tends in that direction."); *U.S. v. Cooper*, 437 F.3d 324, 331–32 (3d Cir. 2006) ("Although a within-guidelines range sentence is more likely to be reasonable than one that lies outside the advisory guidelines range, a within-guidelines sentence is not necessarily reasonable *per se*. Otherwise, as several Courts of Appeals have concluded, we would come close to restoring the mandatory nature of the guidelines excised in *Booker*. . . . Nor do we find it necessary, as did the Court of Appeals for the Seventh Circuit in *United States v. Mykytiuk*, to adopt a rebuttable presumption of reasonableness for within-guidelines sentences. . . . Appellants already bear the burden of proving the unreasonableness of sentences on appeal.").

Without ruling on whether or not the guideline sentence can be presumptively reasonable or not, the Ninth Circuit stated that if a district court "makes the Guideline calculation *the* presumptive sentence, it will commit legal error by misapplying § 3553(a), which now makes the Guideline a, but only a, factor to be considered. . . . [Courts] must properly use the Guideline calculation as advisory and start there, but they must not accord it greater weight than they accord the other § 3553(a) factors." *U.S. v. Zavala*, 443 F.3d 1165, 1170–71 (9th Cir. 2006) (per curiam).

3. Sentence Within Guideline Range Reviewed for Reasonableness Under § 3742(a)

Before *Booker*, the circuits had uniformly held that a sentence that is within the guideline range cannot be challenged on appeal absent an error in applying the Guidelines. Following *Booker*, defendants have appealed sentences that are within the guideline range as "unreasonable," and the government has generally argued that the appellate courts do not have jurisdiction to review a sentence that is within the applicable advisory guideline range.

So far, a majority of the appellate courts have agreed that "when a defendant challenges the procedures of his sentencing proceeding or the reasonableness of the sentence imposed, he effectively claims that the sentence, whether a Guidelines sentence or a non-Guidelines sentence, was 'imposed in violation of law,' 18 U.S.C. § 3742(a)(1). We therefore have authority to review sentences, whether Guidelines sentences or non-Guidelines sentences, for reasonableness." *U.S. v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006). *See also U.S. v. Sanchez-Juarez*, 446 F.3d 1109, 1114 (10th Cir. 2006) ("after *Booker*, every sentence that a district court ultimately imposes must reflect its determination of what is reasonable in light of the same § 3553(a) factors, whether that sentence is within or outside the Guidelines range. Accordingly, as five other circuits have concluded, unreasonable sentences, whether they fall within or outside the advisory Guidelines range, are "imposed in violation of law" and thus reviewable pursuant to § 3742(a)(1)."); *U.S. v. Plouffe*, 445 F.3d 1126, 1130–31 (9th Cir. 2006) ("the reasonableness of a sentence is informed by all of the § 3553(a) factors, including the Guideline range. . . . A sentence that is within the Guideline range therefore may be unreasonable and thus imposed in violation of law pursuant to § 3742(a)(1).") (amending earlier opinion at 436 F.3d 1062); *U.S. v. Montes-Pineda*, 445 F.3d 375, 377–78 (4th Cir. 2006) (agreeing with "every court of appeals to consider this question . . . that it has jurisdiction to review sentences within a properly calculated Guidelines range. . . . [A] contention that the district court imposed an unreasonable sentence is *itself* a contention that the court erred under § 3553(a)."); *U.S. v. Boscarina*, 437 F.3d 634, 637 (7th Cir. 2006) ("an 'unreasonable' sentence is an unlawful sentence, and § 3742(a)(1) authorizes the correction of any illegal sentence. Because sentences within the Guideline range are presumptively but not conclusively reasonable, we are authorized to entertain contentions that a particular Guideline sentence is unreasonably high."); *U.S. v. Cooper*, 437 F.3d 324, 327–28 (3d Cir. 2006) (holding that "we have jurisdiction under § 3742(a)(1) to review sentences for reasonableness" even if within the applicable Guidelines range); *U.S. v. Martinez*, 434 F.3d 1318, 1321–22 (11th Cir. 2006) ("a post-*Booker* appeal based on the 'unreasonableness' of a sentence, whether within or outside the advisory guidelines range, is an appeal asserting that the sentence was imposed in violation of law pursuant to § 3742(a)(1)"); *U.S. v. Mickelson*, 433 F.3d 1050, 1054–55 (8th Cir. 2006) (rejecting government claim that a sentence within the guideline range is not reviewable under § 3742(a): "a guideline sentence, although presumptively reasonable, . . . can still be unreasonable when all the § 3553(a) factors are taken into consideration").

Note: These decisions suggest that a thorough statement of reasons is important even when the sentence is within the advisory guideline range. The Tenth Circuit said as much in remanding a within-the-Guidelines sentence for failure to adequately address the § 3553(a) factors. "[W]here a defendant has raised a nonfrivolous argument that the § 3553(a) factors warrant a below-Guidelines sentence and has expressly requested such a sentence, we must be able to discern from the record that 'the sentencing judge [did] not rest on the guidelines alone, but ... consider[ed] whether the guidelines sentence actually conforms, in the circumstances, to the statutory factors.'" *Sanchez-Juarez*, 446 F.3d at 1117–18.

E. Statement of Reasons, 18 U.S.C. § 3553(c)

Section 3553(c) requires the sentencing court to "state in open court the reasons for its imposition of the particular sentence" and "the reason for imposing a sentence at a particular point within" a guideline range that exceeds 24 months. For a sentence that "is not of the kind, or is outside the range, described in subsection (a)(4)," the court must provide "the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment." Note that, under 28 U.S.C. § 994(w)(1), as amended Mar. 9, 2006, courts must send to the Sentencing Commission, "in a format approved and required by the Commission, a written report of the sentence" that includes the statement of reasons. The Commission has designated Form AO 245B as the approved form.

The appellate courts have tended to stress the continued obligation of courts to explain the reasons for the sentence, especially when a departure or non-Guidelines sentence is involved. The First Circuit stated that "[w]hether the sentence falls inside or outside the applicable guideline range, it is important for us to have the district court's reasons for its sentence; 18 U.S.C. § 3553(c) so requires for sentences outside the guidelines range (or within it if the range is broad) and this is even more important in the more open-ended post-*Booker* world." *U.S. v. Jimenez-Beltre*, 440 F.3d 514, 519 (1st Cir. 2006) (en banc). *See also U.S. v. Jackson*, 408 F.3d 301, 305 (6th Cir. 2005) ("Although we are fully cognizant of the fact that district courts are no longer bound by the Guidelines in the manner they once were, a fact which inevitably may empower district courts with greater flexibility in sentencing, we nonetheless find that, pursuant to *Booker*, we as an appellate court must still have the articulation of the reasons the district court reached the sentence ultimately imposed, as required by 18 U.S.C. § 3553(c). In our view, *Booker* requires an acknowledgment of the defendant's applicable Guidelines range as well as a discussion of the reasonableness of a variation from that range. Further, in determining the sentence, the district court must consider the advisory provisions of the Guidelines and the other factors identified in 18 U.S.C. § 3553(a)."); *U.S. v. Hughes*, 401 F.3d 540, 547 n.5 (4th Cir. 2005) ("This requirement, from § 3553(c)(2), was not excised by *Booker*, and it continues to govern sentencing courts.").

The Third Circuit emphasized that "[t]he rationale by which a district court reaches a final sentence is important. It offers the defendant, the government, the victim, and the public a window into the decision-making process and an explanation of the purposes the sentence is intended to serve. It promotes respect for the adjudicative process, by demonstrating the serious reflection and deliberation that underlies each criminal sentence, and allows for effective appellate oversight. . . . The opinion in *Booker* did not alter the burden of proof or the standard of review for findings of fact relevant to sentencing. But it did, by rendering the United States Sentencing Guidelines advisory rather than mandatory, place a premium on thorough explication of sentencing decisions. A reasoned and rational justification for a sentence is necessary to assure the parties of the fairness of the proceedings, to instill public confidence in the judicial process, and to allow for effective appellate review." *U.S. v. Grier*, 449 F.3d 558, 574–75 (3d Cir. 2006).

Some circuits have noted that the amount of explanation required varies with the circumstances. "When a defendant has not asserted the import of a particular § 3553(a) factor, nothing in the statute requires the court to explain sua sponte why it did not find that factor relevant to its discretionary decision. And nothing in *Booker* added such a re-

quirement. . . . Something more *is* required if a district court imposes a sentence outside the Guidelines range. Section 3553(c)(2) provides that, if a sentence 'is not of the kind, or is outside the range' described by the Guidelines, the court must state 'the *specific* reason for the imposition of a sentence different from that described, which reasons must also be stated *with specificity* in the written order of judgment and commitment.' 18 U.S.C. § 3553(c)(2) (emphasis added)." *U.S. v. Simpson*, 430 F.3d 1177, 1187 & n.10 (D.C. Cir. 2005).

See also U.S. v. Lopez-Flores, 444 F.3d 1218, 1222 (10th Cir. 2006) ("When the defendant has not raised any substantial contentions concerning non-Guidelines § 3553(a) factors and the district court imposes a sentence within the Guidelines range, our post-*Booker* precedents do not require the court to explain on the record how the § 3553(a) factors justify the sentence."); *U.S. v. Mares*, 402 F.3d 511, 519–20 (5th Cir. 2005) ("When the judge exercises her discretion to impose a sentence within the Guideline range and states for the record that she is doing so, little explanation is required. However, when the judge elects to give a non-Guideline sentence, she should carefully articulate the reasons she concludes that the sentence she has selected is appropriate for that defendant. These reasons should be fact specific and include, for example, aggravating or mitigating circumstances relating to personal characteristics of the defendant, his offense conduct, his criminal history, relevant conduct or other facts specific to the case at hand which led the court to conclude that the sentence imposed was fair and reasonable. Such reasons are essential to permit this court to review the sentence for reasonableness as directed by *Booker*.").

Other circuits have focused on the importance to appellate review of a specific explanation for the sentence. *See, e.g., U.S. v. Fernandez*, 443 F.3d 19, 30 n.8 (2d Cir. 2006) (citing § 3553(c)(2), "we continue to encourage sentencing judges to facilitate our review by providing complete and detailed explanations regarding their sentencing decisions"); *U.S. v. Gatewood*, 438 F.3d 894, 896 (8th Cir. 2006) ("For this court to properly carry out the appellate review mandated by *Booker*, it is essential that the district court explain the reasons why it has imposed a sentence outside the guidelines sentencing range in a particular case."); *U.S. v. Baretz*, 411 F.3d 867, 878 n.11 (7th Cir. 2005) ("We pause respectfully to remind our colleagues in the district courts of the necessity of their explaining on the record the reasons for their decisions in calculating the guideline sentence and in determining the final sentence imposed. These findings are of extreme importance to this court in fulfilling its duty to review these adjudications. Sufficient detail in these findings always is important. In cases such as this one, involving relatively complicated financial transactions and relationships, such detailed findings especially are important—and appreciated by those of us who have only the cold record to guide us in our work.").

II. Review of Sentences After *Booker*

A. Generally

The circuits appear to agree that the standard of review of Guidelines decisions remains the same as before *Booker*, that the Guidelines must be correctly interpreted and applied before the final sentence may be reviewed for reasonableness (or for *un*reasonableness in some courts), and that only the final sentence is reviewed for reasonableness. "We conclude that the unreasonableness standard articulated by the Supreme Court in *Booker* ap-

plies only to the district court's determination of the appropriate ultimate sentence to impose based on all the factors in 18 U.S.C. § 3553(a), not to the district court's interpretation of the meaning and applicability of the guidelines themselves." *U.S. v. Mathijssen*, 406 F.3d 496, 498 (8th Cir. 2005). *Accord U.S. v. Cantrell*, 433 F.3d 1269, 1280 (9th Cir. 2006) ("*Booker*'s mandate that appellate courts should review sentences for 'reasonableness' . . . applies only to our review of the ultimate sentence; after *Booker* we continue to review 'the district court's interpretation of the Sentencing Guidelines de novo, the district court's application of the Sentencing Guidelines to the facts of [a] case for abuse of discretion, and the district court's factual findings for clear error.' . . . If there was a material error in the Guidelines calculation that serves as the starting point for the district court's sentencing decision, we will remand for resentencing pursuant to 18 U.S.C. § 3742(f), without reaching the question of whether the sentence as a whole is reasonable in light of § 3553(a)."); *U.S. v. Villegas*, 404 F.3d 355, 361–62 (5th Cir. 2005) (per curiam) ("nothing suggests that *Booker* injected a reasonableness standard into the question whether the district court properly interpreted and applied the Guidelines or that an appellate court no longer reviews a district court's interpretation and application of the Guidelines de novo. *Booker* left standing all sections of the Sentencing Reform Act other than §§ 3553(b)(1) and 3742(e). . . . Thus, § 3742(a) still remains in force," allowing defendant to appeal a sentence that was "imposed as a result of an incorrect application of the sentencing guidelines," as does § 3742(f)(1), requiring remand of such an incorrect sentence.).

"[T]his Court will continue to review factual findings relevant to the Guidelines for clear error and to exercise plenary review over a district court's interpretation of the Guidelines. . . . A sentence imposed as a result of a clearly erroneous factual conclusion will generally be deemed 'unreasonable' and, subject to the doctrines of plain and harmless error, will result in remand to the district court for resentencing." *U.S. v. Grier*, 449 F.3d 558, 571–72 (3d Cir. 2006). *Accord U.S. v. Green*, 436 F.3d 449, 456–57 (4th Cir. 2006) ("On a discrete matter where the question is purely legal, we review the matter *de novo*, and where the question is about a finding of fact, for clear error." If a sentence "is based on an error in construing or applying the Guidelines, it will be found unreasonable and vacated."); *U.S. v. Garcia*, 413 F.3d 201, 222 & n.16 (2d Cir. 2005) ("even after *Booker*'s excision of § 3742(e), it is appropriate to maintain a clear error standard of review for appellate challenges to judicial fact-finding at sentencing. . . . This is true notwithstanding the Supreme Court's articulation in *Booker* of a reasonableness standard of review for federal sentences challenged on direct appeal." When "a defendant asserts that a district court's factual findings cannot, as a matter of law, support a particular Guidelines enhancement, we conduct de novo review of that legal question."); *U.S. v. Gibson*, 409 F.3d 325, 338–39 (6th Cir. 2005) ("We review de novo a district court's interpretation of the Sentencing Guidelines. . . . Once we conclude that the district court has properly consulted the Sentencing Guidelines, we review the sentence for reasonableness."); *U.S. v. Sharpfish*, 408 F.3d 507, 510 (8th Cir. 2005) ("*Booker* notwithstanding, we continue to review the district court's findings of fact on sentencing for clear error and its application of the sentencing guidelines to the facts de novo"); *U.S. v. Crawford*, 407 F.3d 1174, 1179 (11th Cir. 2005) ("*Booker* does not alter our review of the application of the Guidelines").

B. Review for "Reasonableness"

Rather than trying to define what is "reasonable," the appellate courts have focused on the procedure that should be followed by the district court in reaching its sentence and the standard of review on appeal. The Eighth Circuit, for example, likened its review for reasonableness to the review for abuse of discretion, and stated that a sentence may be unreasonable "if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case." *U.S. v. Haack,* 403 F.3d 997, 1004 (8th Cir. 2005). The court later added that "[i]n the context of reviewing a sentence for reasonableness, a proper or relevant factor is one listed under § 3553(a)." *U.S. v. Long Soldier*, 431 F.3d 1120, 1123 (8th Cir. 2005). *See also U.S. v. Grier,* 449 F.3d 558, 574 (3d Cir. 2006) ("The touchstone of 'reasonableness' is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 U.S.C. § 3553(a). . . . It must be clear that the district court understood and reasonably discharged its obligation to take all of the relevant factors into account in imposing a final sentence.").

The Fourth Circuit concluded that "the overarching standard of review for unreasonableness will not depend on whether we agree with the particular sentence selected, . . . but whether the sentence was selected pursuant to a reasonable process in accordance with law, in which the court did not give excessive weight to any relevant factor, and which effected a fair and just result in light of the relevant facts and law." *U.S. v. Green,* 436 F.3d 449, 456–57 (4th Cir. 2006). *Cf. U.S. v. Chandler,* 419 F.3d 484, 488 (6th Cir. 2005) (although there is "'no requirement that the district court . . . engage in a ritualistic incantation of' the § 3553(a) factors it considers, . . . the district court's sentence should nonetheless reflect the considerations listed in § 3553(a)").

In emphasizing that finding that defendant is a career offender "is not the end of the sentencing inquiry, rather it is just the beginning," the Sixth Circuit also noted that "a district court's job is not to impose a 'reasonable' sentence. Rather, a district court's mandate is to impose 'a sentence sufficient, but not greater than necessary, to comply with the purposes' of § 3553(a)(2). Reasonableness is the *appellate* standard of review in judging whether a district court has accomplished this task." *U.S. v. Foreman,* 436 F.3d 638, 643–44 & n.1 (6th Cir. 2006).

The Seventh Circuit reminded courts that "the defendant must be given an opportunity to draw the judge's attention to any factor listed in section 3553(a) that might warrant a sentence different from the guidelines sentence, for it is possible for such a variant sentence to be reasonable and thus within the sentencing judge's discretion under the new regime in which the guidelines, being advisory, can be trumped by section 3553(a), which as we have stressed is mandatory." *U.S. v. Dean,* 414 F.3d 725, 730–31 (7th Cir. 2005). *Cf. U.S. v. Price,* 409 F.3d 436, 443 (D.C. Cir. 2005) ("We do not mean to suggest that the District Court is required to adhere to the Sentencing Guidelines. Under *Booker*, the Guidelines are now *advisory*, *i.e.*, one among a number of factors to be weighed by the District Court in sentencing.").

C. Review of Departures and Non-Guidelines Sentences

1. Generally

Booker excised 18 U.S.C. § 3742(e), which required de novo review of departures. "To the extent [the government] urges this court to examine the departure decision de novo pursuant to 18 U.S.C. § 3742(e), as amended in 2003 by the PROTECT Act, . . . such review is now foreclosed by [*Booker*], which, inter alia, excised § 3742(e) from federal sentencing law to permit the federal Sentencing Guidelines to be treated as advisory rather than mandatory . . . . *Booker* instructs that sentences should be reviewed on appeal only for 'unreasonableness.'" *U.S. v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005). *See also U.S. v. Menyweather*, 447 F.3d 625, 630 (9th Cir. 2006) (post-*Booker*, "the appropriate standard for reviewing the district court's determination of its departure authority is abuse of discretion"); *U.S. v. Fogg*, 409 F.3d 1022, 1026 (8th Cir. 2005) ("We review de novo whether the sentence was imposed in violation of law or as the result of an incorrect application of the sentencing guidelines. . . . We review for abuse of discretion the decision to depart upward from the guidelines, and we review the extent of the departure for reasonableness.").

The Fifth Circuit noted that "*Booker* does not distinguish between guideline and non-guideline sentences in requiring a reasonableness review. Thus, if reasonableness review requires an abuse of discretion standard for guidelines sentences, the same should follow for non-guidelines sentences." A court's reasons for imposing a sentence outside of the advisory guideline range "should be fact specific and include, for example, aggravating or mitigating circumstances relating to personal characteristics of the defendant, his offense conduct, his criminal history, relevant conduct or other facts specific to the case at hand which led the court to conclude that the sentence imposed was fair and reasonable. Such reasons are essential to permit this court to review the sentence for reasonableness as directed by *Booker*." *U.S. v. Reinhart*, 442 F.3d 857, 862 (5th Cir. 2006).

"After *Booker*, . . . we ask 'whether the district court's decision to grant a § 3553(a) variance from the appropriate guidelines range is reasonable, and whether the extent of any § 3553(a) variance or guidelines departure is reasonable.' . . . Because the guidelines are now advisory, a reasonable departure is not limited solely to circumstances that the formerly mandatory guidelines framework would have deemed permissible bases for departure. We must consider more broadly whether the district court considered and weighed the § 3553(a) factors in addition to the recommended guidelines range and stated its reasons for choosing the particular sentence. We recognize that deference is often appropriate because the district court is in a better position to judge the credibility of the witnesses and to find the relevant facts." *U.S. v. Hadash*, 408 F.3d 1080, 1083–84 (8th Cir. 2005). *Cf. U.S. v. Castro-Juarez*, 425 F.3d 430, 433 (7th Cir. 2005): "we are not asked to decide here whether 48 months *could* be a reasonable sentence; our function is to assess whether the district court's choice of sentence is adequately explained given the record before us").

The Tenth Circuit emphasized that "[t]he same rules of appellate review must apply to district court sentencing decisions that are above an advisory guidelines range as to those below an advisory guidelines range. . . . Early evidence about appellate review of sentencing decisions for reasonableness creates concerns that below guidelines-range sentences are treated less deferentially by appellate courts than above guidelines-range

sentences. According to the United States Sentencing Commission, nearly three times as many below guidelines-range sentences have been reversed for unreasonableness as have been affirmed as reasonable. *See* Final Report on the Impact of *United States v. Booker* On Federal Sentencing, United States Sentencing Commission (March 2006) at 30. In contrast, the same report states that close to seven times as many above guidelines-range sentences have been found reasonable than have been found unreasonable. *Id.*" *U.S. v. Cage,* – F.3d – at n.5 (10th Cir. June 8, 2006).

2. Extent of Variation From Advisory Guidelines Sentence

The Seventh Circuit held that "the farther the judge's sentence departs from the guidelines sentence (in either direction—that of greater severity, or that of greater lenity), the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed." *U.S. v. Dean,* 414 F.3d 725, 729 (7th Cir. 2005). *Accord U.S. v. Smith,* 445 F.3d 1, 4 (1st Cir. 2006) (quoting *Dean*); *U.S. v. Claiborne,* 439 F.3d 479, 481 (8th Cir. 2006) ("'How compelling th[e] justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed.'" (citation omitted)); *U.S. v. Moreland,* 437 F.3d 424, 432 (4th Cir. 2006) ("Generally, if the reasons justifying the variance are tied to § 3553(a) and are plausible, the sentence will be deemed reasonable. However, when the variance is a substantial one, . . . we must more carefully scrutinize the reasoning offered by the district court in support of the sentence. The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be.").

The Fifth Circuit agreed, and added that "the district court must more thoroughly articulate its reasons when it imposes a non-Guideline sentence than when it imposes a sentence under authority of the Sentencing Guidelines. . . . These reasons should be fact-specific and consistent with the sentencing factors enumerated in section 3553(a). . . . A non-Guideline sentence unreasonably fails to reflect the statutory sentencing factors where it (1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors." *U.S. v. Smith,* 440 F.3d 704, 707 (5th Cir. 2006). *Cf. U.S. v. Simpson,* 430 F.3d 1177, 1187 n. 10 (D.C.Cir. 2005) (citing *Dean* in footnote after noting that "[s]omething more *is* required if a district court imposes a sentence outside the Guidelines").

The Seventh Circuit has also stated that "[e]xplicit factfinding on the factors influencing a decision to exceed the guidelines range is not required, except where a particular fact is contested and 'may be decisive to the choice of sentence.'" *U.S. v. Johnson,* 427 F.3d 423, 427 (7th Cir. 2005). *Cf. U.S. v. Dalton,* 404 F.3d 1029, 1033–34 (8th Cir. 2006) ("An extraordinary reduction must be supported by extraordinary circumstances.").

Citing some of these cases, the Tenth Circuit found that a sentence of six days when the guideline minimum was 46 months was unreasonable under the circumstances. Although the facts of the case "may justify some discrepancy from the advisory guidelines range, they simply are not dramatic enough to warrant such an extreme downward variance." *U.S. v. Cage,* - F.3d – (10th Cir. June 8, 2006).

"[W]e note that several other circuits have endorsed a rule that requires district courts to offer a more compelling accounting the farther a sentence deviates from the advisory

Guidelines range . . . . While we have yet to adopt this standard as a rule in this circuit, and do not do so here, we emphasize that our own ability to uphold a sentence as reasonable will be informed by the district court's statement of reasons (or lack thereof) for the sentence that it elects to impose. . . . Indeed, a district court may be able to justify a marginal sentence by including a compelling statement of reasons that reflect consideration of § 3553(a) and set forth why it was desirable to deviate from the Guidelines. In the absence of such a compelling statement, we may be forced to vacate a marginal sentence where the record is insufficient, on its own, to support the sentence as reasonable." *U.S. v. Rattoballi*, — F.3d — (2d Cir. June 15, 2006) (as amended June 21, 2006).

3. Examples of Non-Guidelines Sentence Review

a. Below Guidelines Range Sentences Reversed/Remanded

U.S. v. Ture, 450 F.3d 352, – (8th Cir. 2006): Remanding sentence that included two years of probation and 300 hours of community service, but no imprisonment. "This, in effect, amounts to a 100% downward variance from the Guidelines range. This variance is unreasonable because such an extraordinary variance is not supported by extraordinary circumstances. . . . [T]he District Court failed to accord significant weight to the Guidelines range, to the seriousness of Ture's offense, or to the need to avoid unwarranted sentencing disparities. The resultant sentence also does not promote respect for federal tax laws, provide just punishment, or ensure adequate deterrence to willful tax cheats. See 18 U.S.C. § 3553(a)(2), (4), (6). Giving due weight to these factors, we conclude that any sentence without a term of imprisonment is wholly unreasonable."

U.S. v. Smith, 445 F.3d 1, 5–7 (1st Cir. 2006): Remanded because facts simply did not support a large deviation from the advisory guideline range. "In a nutshell, the offense is quite serious and the defendant's record is unpromising, and there are no developed findings to indicate that rehabilitation is a better prospect than usual. A sentence less than half the minimum range appears to us plainly unreasonable. Although we are unhappy to disagree with the respected and experienced district judge in this case, we cannot sustain the sentence on the findings and explanation before us."

U.S. v. Pisman, 443 F.3d 912, 915–16 (7th Cir. 2006): Remanding 48-month reduction of sentence to 60-month statutory minimum to lessen disparity with "more culpable" codefendant. The codefendant had pled guilty and cooperated in the prosecution of defendant, so this was not an "unwarranted" disparity that could justify a lower sentence for defendant.

U.S. v. Lazenby, 439 F.3d 928, 932–33 (8th Cir. 2006): Remanding defendant's "downward variance" as unreasonable. "The twelve-month prison sentence is 83% below the 70-month bottom of her advisory guidelines range. . . . This extraordinary variance is not supported by comparably extraordinary circumstances. . . . [T]aken together, [the facts] do not justify an 83% variance because a twelve month sentence does not adequately reflect the seriousness of and provide just punishment for Lazenby's drug offense."

U.S. v. Armendariz, No. 05-20427 (5th Cir. June 5, 2006): Where Guidelines called for a supervised release term of three to five years, and could be up to life, it was unreasonable for district court to impose no term on defendant convicted of attempting to entice a minor into sexual activity using the Internet. Under the circumstances, the "failure to impose supervised release was unreasonable because it fails to account for the totality

of the relevant § 3553(a) factors . . . which should have received significant weight," namely the recommended supervised release term under U.S.S.G. § 5D1.2(b), the need for adequate deterrence, protecting the public from defendant, and providing defendant with needed correctional treatment.

b. Below Guidelines Range Sentences Affirmed

U.S. v. Krutsinger, 449 F.3d 827, 829–30 (8th Cir. 2006) affirming as reasonable sentence of 24 months, which was below the guideline range of 70–87 months and the government's recommendation of 70 months following a §5K1.1 motion. The lower sentence was based on defendant's "extraordinary rehabilitative efforts," her difficulties with obsessive-compulsive disorder, employment, family circumstances, and avoiding disparity with a similarly situated, perhaps more culpable coconspirator who received a lower sentence. Appellate court focused on the disparity issue, holding that the district court did not abuse its discretion under the "unusual scenario" presented in this case.

U.S. v. Baker, 445 F.3d 987, 991–93 (7th Cir. 2006): Affirmed 87-month sentence, 21 months below the guideline range minimum, which included a lifetime term of supervised release for a defendant convicted of distributing child pornography. "The district court's rationale at Mr. Baker's sentencing hearing for departing from the advisory guidelines range is adequate and premised properly on the factors specified in § 3553(a). . . . Th[e] extended discussion, touching upon various significant § 3553(a) factors, was sufficiently proportional to the district court's deviation from the Guidelines to satisfy [our] requirements."

U.S. v. Williams, 435 F.3d 1350, 1355–56 (11th Cir. 2006): Affirmed lower sentence for defendant who was a career offender subject to a range of 188 to 235 months. Court imposed lower sentence of 90 months because it determined the career offender sentence was unreasonable given the nature of defendant's current offense, the almost doubling of the guideline range that would apply absent career offender status, and the defendant's criminal history. "This is not a case where the district court imposed a non-Guidelines sentence based solely on its disagreement with the Guidelines. . . . [T]he district court correctly calculated the Guidelines range and gave specific, valid reasons for sentencing lower than the advisory range."

c. Above Guidelines Range Sentence Remanded

U.S. v. Zapete-Garcia, 447 F.3d 57, 60–61 (1st Cir. 2006): Remanding 48-month sentence that was eight times greater than the top of the 0–6-month guideline range. The reasons for the increase—defendant was previously deported twice and had a 1991 arrest for which there was still an outstanding bench warrant—were accounted for by the Guidelines. "When a factor is already included in the calculation of the guidelines sentencing range, a judge who wishes to rely on that same factor to impose a sentence above or below the range must articulate specifically the reasons that this particular defendant's situation is different from the ordinary situation covered by the guidelines calculation." The court concluded that "it was unreasonable . . . to rely on Zapete's single prior arrest" to increase the sentence, and there was not an adequate explanation to justify such a large increase based on the previous deportations.

U.S. v. Davenport, 445 F.3d 366, 371–72 (4th Cir. 2006): Affirmed increase from 30–37 month range based on underrepresentation of criminal history, the seriousness of the offense, and deterrence. However, "the length of the sentence was unreasonable. The sentence imposed by the district court—120 months imprisonment—is more than three times

the top of the advisory guideline range. So great a divergence requires 'compelling . . . reasons,'" which the district court did not adequately explain.

U.S. v. Castro-Juarez, 425 F.3d 430, 434–36 (7th Cir. 2005): Explanation for increasing sentence to more than double the high end of the guideline range was not "sufficiently compelling." The increase was based on defendant's underrepresented criminal history, but based on a "loose comparison" to Guidelines departure analysis, only a much smaller increase would be justified.

d. Above Guidelines Range Sentence Affirmed

U.S. v. Fairclough, 439 F.3d 76, 80–81 (2d Cir. 2006): Upward variance to 48 months, which was 21 months above guideline range maximum, was reasonable. "The District Court's sentence reflects adequate consideration of the factors set forth in 18 U.S.C. § 3553(a), including the nature and circumstances of the offense, Fairclough's personal history and characteristics, . . . and the purposes set forth at 18 U.S.C. § 3553(a)(2). . . . In light of all of the relevant considerations, including the § 3553(a) factors, the reasoning given by the District Court, and the deference we need afford the District Court's sentencing judgment, we find the sentence reasonable."

U.S. v. Larabee, 436 F.3d 890, 892–93 (8th Cir. 2006): Upward variance of 54 percent from the guideline range maximum of 235 months to a sentence of 363 months held reasonable. "[T]he district court's stated justification for the sentence convinces us that the district court did not exceed the permissible bounds of its discretion . . . [where] the record reflects that the district court took into account the relevant § 3553(a) factors and adequately explained why it chose the sentence."

U.S. v. Smith, 417 F.3d 483, 491–92 (5th Cir. 2005): Using post-*Booker* analysis to hold that a pre-*Booker* upward departure, from a 33–41-month guideline range to 120 months, was reasonable. "We are persuaded, guided by the factors in § 3553(a), that the sentence imposed was reasonable for the reasons given by the district court," namely a seriously underrepresented criminal history.

D. Review of Discretionary Refusal to Depart Downward

Pre-*Booker*, if a sentencing court recognized its discretion to depart downward from the guideline range but decided not to do so, its refusal to depart was not reviewable by the appellate court. However, after *Booker*, some circuits have concluded that the sentence as a whole will be reviewed for reasonableness, whether or not a court specifically reviews the decision to not depart downward under the Guidelines. As the Tenth Circuit put it, "after *Booker* our review is for 'reasonableness,' . . . and this review under § 3742(a)(1) can now encompass arguments which were previously barred as an attempt to appeal a denial of a downward departure. . . . Accordingly, we hold that while we do not have jurisdiction to review the district court's discretionary decision to deny a downward departure, we have jurisdiction post-*Booker* to review the sentence imposed for reasonableness." *U.S. v. Chavez-Diaz*, 444 F.3d 1223, 1228–29 (10th Cir. 2006).

See also U.S. v. McBride, 434 F.3d 470, 476–77 (6th Cir. 2006) ("The district court's decision to deny a Guideline-based departure . . . is not reviewable by this Court so long as the district court was aware of and understood its discretion to make such a Guideline-based departure. This, however, . . . simply precludes our review of that narrow determination of a denial of a Chapter 5 Guideline departure within the context of the Guideline calculation. It does not prevent our review of a defendant's claim that his sentence is ex-

cessive based on the district court's unreasonable analysis of the section 3553(a) factors in their totality." Sentence was affirmed as reasonable.). *Cf. U.S. v. Cooper*, 437 F.3d 324, 332–33 (3d Cir. 2006) (en banc) ("*Booker* does not compel us to reverse th[e] precedent" of not reviewing discretionary decisions to deny departure, but sentence as a whole reviewed for reasonableness where defendant claimed that district court did not adequately consider § 3553(a) factors and that she should have received a departure under U.S.S.G. §4A1.3 for overrepresentation of her criminal history).

The Seventh Circuit has stated explicitly that it will review the decision to deny departure as part of its reasonableness review. *See U.S. v. Vaughn*, 433 F.3d 917, 923–24 (7th Cir. 2006) ("Post-*Booker*, because we must review all sentences for reasonableness in light of the factors specified in § 3553(a), we necessarily must scrutinize, as part of our review, the district court's refusal to depart from the advisory sentencing range." Affirmed because "district court's conclusions are supported by the record and 'appropriately related to the factors specified in § 3553(a).'"). *See also U.S. v. Laufle*, 433 F.3d 981, 987–98 (7th Cir. 2006) (reviewing and affirming denial of §5K1.1 substantial assistance departure). *Cf. U.S. v. Terrell*, 445 F.3d 1261, 1264–65 (10th Cir. 2006) (rejecting defendant's claim that district court gave too much weight to the Guidelines in choosing sentence—which at 78 months was already below the guideline range of 92–115 months but was not as low as the 63 months recommended by government; district court did not err in giving "heavy weight" to Guidelines where it also "thoughtfully considered" other § 3553(a) factors in reaching final sentence).

E.`Factors That Are "Prohibited" or "Discouraged" Under the Guidelines May Be Considered for Non-Guidelines Sentence

1. Discouraged Factors

If a factor is "discouraged" by the Guidelines as a basis for departure, it may be considered when determining whether to impose a non-Guidelines sentence under § 3553(a). "While the guidelines discourage consideration of certain factors for downward departures, *Booker* frees courts to consider those factors as part of their analysis under § 3553(a)." *U.S. v. Andrews*, 447 F.3d 806, 812 (10th Cir. 2006). *See also U.S. v. Menyweather*, 447 F.3d 625, 633–34 (9th Cir. 2006) (even if pre-*Booker* departure for family circumstances was improper, it was clear at post-*Booker* appeal that court would have imposed same sentence under § 3553(a) analysis without abusing its discretion: "In the 'broader appraisal' available to courts after *Booker*, courts can justify consideration of family responsibilities, an aspect of defendant's 'history and characteristics,' 18 U.S.C. § 3553(a)(1), for reasons extending beyond the Guidelines."); *U.S. v. Lata*, 415 F.3d 107, 113 (1st Cir. 2005) (remanding pre-*Booker* sentence for resentencing, noting that "both age and infirmity were discouraged as bases for departure, §5H1.4; under [§ 3553(a)] alone, conceivably they might be afforded more weight in a particular case"); *U.S. v. Ryder*, 414 F.3d 908, 920 (8th Cir. 2005) ("The prior mandatory nature of the Guidelines deprived the district court of the opportunity to consider age and physical condition in any manner other than as a basis for a Guidelines departure. Now coupled with the requirements in § 3553 that a district court consider a defendant's characteristics and the need to provide medical care in the most effective manner when sentencing a defendant, the district court would be well within its discretion to at least consider [defendants'] ages and medical conditions as non-Guideline factors on remand."); *U.S. v. Jackson*, 408 F.3d

301, 305 n.3 (6th Cir. 2005) (if a variance "relies on any factors which are deemed by the Guidelines to be prohibited or discouraged, see, e.g., U.S.S.G. §§ 5H1.1 (age), 5H1.4 (physical appearance or condition), 5H1.5 (employment record), 5H1.6 (family ties and responsibilities), 5H1.10 (race), the district court will need to address these provisions and decide what weight, if any, to afford them in light of *Booker*").

Although "lack of criminal history" has been rejected as a basis for downward departure under the Guidelines because it is "adequately considered" in the guideline calculation, the Eighth Circuit indicated it could be considered for a non-Guidelines sentence. "Myers' lack of a criminal history, while reflected in the advisory sentencing guidelines, was properly considered as part of 'the history and characteristics of the defendant.' 18 U.S.C. § 3553(a)(1)." The case, however, was remanded for a "more explicit and thorough consideration of all factors enumerated in section 3553(a)." *U.S. v. Myers,* 439 F.3d 415, 418 (8th Cir. 2005).

The Second Circuit cautioned, however, that "[a] non-Guidelines sentence that a district court imposes in reliance on factors incompatible with the Commission's policy statements may be deemed substantively unreasonable in the absence of persuasive explanation as to why the sentence actually comports with the § 3553(a) factors." *U.S. v. Rattoballi,* – F.3d – (2d Cir. June 15, 2006) (as amended June 21, 2006).

2. Prohibited Factors

The Guidelines prohibit certain factors as grounds for downward departure, such as drug or alcohol dependence and gambling addiction, § 5H1.4, lack of guidance as a youth, § 5H1.12, and post-sentencing rehabilitation, § 5K2.19. After *Booker*, however, such factors may at least be considered. The First Circuit rejected the government's argument that it was legal error to rely on factors that are discouraged or prohibited by the Guidelines. "That a factor is discouraged or forbidden under the guidelines does not automatically make it irrelevant when a court is weighing the statutory factors apart from the guidelines. The guidelines—being advisory—are no longer decisive as to factors anymore than as to results. About the best one can say for the government's argument is that reliance on a discounted or excluded factor may, like the extent of the variance, have some bearing on reasonableness." *U.S. v. Smith,* 445 F.3d 1, 5 (1st Cir. 2006).

In remanding a sentence below the guideline range that defendant argued was reasonable in light of his history of drug abuse, the Eighth Circuit agreed that "a guidelines departure prohibition does not preclude the district court from considering that factor when the issue is a variance under *Booker*, [but] the Sentencing Commission's policy statements show the need to explain why a particular defendant's drug problems warrant extreme leniency." *U.S. v. Gatewood,* 438 F.3d 894, 897 (8th Cir. 2006).

3. Substantial Assistance

A departure for substantial assistance requires a motion by the government. However, after *Booker* a defendant's assistance to the government could possibly be considered—even without such a motion—as part of the § 3553(a) analysis. Although it affirmed defendant's sentence because the district court was aware of this possibility but chose not to impose a lower sentence for defendant's cooperation, the Second Circuit concluded that cooperation could be considered in the absence of a §5K1.1 motion: "We agree that in formulating a reasonable sentence a sentencing judge must consider 'the history and characteristics of the defendant' within the meaning of 18 U.S.C. § 3553(a)(1), as well as

the other factors enumerated in § 3553(a), and should take under advisement any related arguments, including the contention that a defendant made efforts to cooperate, even if those efforts did not yield a Government motion for a downward departure pursuant to U.S.S.G. § 5K1.1 ('non-5K cooperation'). Section 3553(a)(1), in particular, is worded broadly, and it contains no express limitations as to what 'history and characteristics of the defendant' are relevant. This sweeping provision presumably includes the history of a defendant's cooperation and characteristics evidenced by cooperation, such as remorse or rehabilitation." *U.S. v. Fernandez*, 443 F.3d 19, 33 (2d Cir. 2006).

The Eighth Circuit likewise found that a court could consider defendant's cooperation despite the lack of §5K1.1 motion by the government. "Prior to *Booker*, the court was . . . virtually precluded from considering this factor [absent a government motion]. . . . Under *Booker*, the prosecution's evaluation of the cooperation factor remains critical but is less controlling." *U.S. v. Lazenby*, 439 F.3d 928, 933–34 (8th Cir. 2006) (remanding for re-sentencing on this and other grounds).

III. Other Post-Booker Issues

A. "Fast-Track" Disparity

Some districts have "fast-track" programs, whereby defendants accused of certain immigration offenses can obtain a shorter sentence in exchange for pleading guilty early and waiving the right to appeal. Defendants in districts without fast-track programs have claimed that unwarranted sentencing disparities exist between districts that have and those that do not have a fast-track program, and that this disparity warrants a sentence outside the guideline range. *See* 18 U.S.C. § 3553(a)(6) (courts should consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct"). So far, appellate courts have rejected claims that the disparity itself is so unreasonable that it should require a non-Guideline sentence. They have not ruled out the possibility that such disparity might warrant a lower sentence in an appropriate case, but none have found that the defendant demonstrated facts that would justify such relief.

In a Fourth Circuit case, for example, the court agreed that defendant "has convincingly demonstrated that significant sentencing disparities exist between 'fast-track' and non-'fast-track' districts. But he has not shown that, in light of the other § 3553(a) factors, a general allegation of such disparities *compelled* the district court to impose a below-Guidelines sentence in his particular case. . . . This is not to say that a district court may *never* consider the disparities between 'fast-track' and non-'fast-track' districts in calculating an appropriate sentence under § 3553(a). . . . Rather, we hold that merely pointing out the existence of such disparities, with no reference to the characteristics of the particular defendant, does not render a within-Guidelines sentence unreasonable." *U.S. v. Montes-Pineda*, 445 F.3d 375, 379–80 (4th Cir. 2006).

See also U.S. v. Marcial-Santiago, 447 F.3d 715, 718–19 (9th Cir. 2006) ("In light of Congress's explicit authorization of fast-track programs in the PROTECT Act, we cannot say that the disparity between Appellants' sentences and the sentences imposed on similarly-situated defendants in fast-track districts is 'unwarranted' within the meaning of § 3553(a)(6). . . . It is justified by the benefits gained by the government when defendants plead guilty early in criminal proceedings."); *U.S. v. Martinez-Martinez*, 442 F.3d 539,

543 (7th Cir. 2006) (without more, not unreasonable to refuse to impose lower sentence: "we cannot say that a sentence is unreasonable simply because it was imposed in a district that does not employ an early disposition program"); *U.S. v. Galicia-Cardenas,* 443 F.3d 553, 555 (7th Cir. 2006) (following *Martinez-Martinez,* reversing downward departure based solely on lack of a fast-track program in this district: "we cannot say that a sentence imposed after a downward departure is by itself reasonable because a district does not have a fast-track program. . . . Mr. Galicia-Cardenas must be resentenced without a credit for Wisconsin's lack of a fast-track program. Whether he deserves a sentence below the advisory guideline range based on other factors is left to the discretion of the district court."); *U.S. v. Jimenez-Beltre,* 440 F.3d 514, 519 (1st Cir. 2006) (en banc) (even if such a departure were permitted, defendant failed to carry burden to show that his circumstances would warrant such a departure); *U.S. v. Sebastian,* 436 F.3d 913, 916 (8th Cir. 2006) (holding that "to require the district court to vary from the advisory guidelines based solely on the existence of early disposition programs in other districts would conflict with the decision of Congress to limit the availability of such sentence reductions to select geographical areas, and with the Attorney General's exercise of prosecutorial discretion to refrain from authorizing early disposition agreements in Eastern Missouri").

B. Notice Before Imposing Non-Guidelines Sentence

Must there be notice—like that for a departure—to the defendant and/or the government that the court is considering imposing a sentence outside of the advisory Guidelines range on a ground not previously identified? So far, the circuits that have ruled on the issue have gone both ways. The Third, Seventh, and Eighth Circuits have held that notice is not required. The Seventh Circuit concluded that "[t]he element of unfair surprise that underlay *Burns* and led to the creation of Rule 32(h) is no longer present; defendants are on notice post-*Booker* that sentencing courts have discretion to consider any of the factors specified in § 3553(a)." *U.S. v. Walker,* 447 F.3d 999, 1006–07 (7th Cir. 2006) (affirming upward variance). *Accord U.S. v. Vampire Nation,* – F.3d – (3d Cir. June 20, 2006) (agreeing with *Walker* in affirming upward variance: "given that defendants are aware that courts will consider the broad range of factors set forth in § 3553(a) at sentencing, we perceive none of the 'unfair surprise' considerations that motivated the enactment of Rule 32(h). . . . Nevertheless, if a court is contemplating a departure, it should continue to give notice as it did before *Booker,* . . . and district courts should be careful to articulate whether a sentence is a departure or a variance from an advisory Guidelines range.") *See also U.S. v. Long Soldier,* 431 F.3d 1120, 1122 (8th Cir. 2005) (affirmed: "notice pursuant to Rule 32(h) is not required when the adjustment to the sentence is effected by a variance, rather than by a departure. . . . Because the district court effected only an upward variance, no Rule 32(h) notice was required.").

The Fourth and Ninth Circuits held that such notice is required. "The need for such notice is as clear now as before *Booker*. There is 'essentially no limit on the number of potential factors that may warrant a departure' or a variance, and neither the defendant nor the Government 'is in a position to guess when or on what grounds a district court might depart' or vary from the guidelines. . . . We therefore conclude that notice of an intent to depart or vary from the guidelines remains a critical part of sentencing post-*Booker*." *U.S. v. Davenport,* 445 F.3d 366, 371 (4th Cir. 2006). *See also U.S. v. Evans-Martinez,* 448 F.3d 1163, 1167 (9th Cir. 2006) ("Although we have not previously held

that the notice requirement of Rule 32(h) survives *Booker*, the Government conceded at oral argument that the district court's failure to provide notice constitutes plain error. We hold Rule 32(h) requires that a district court provide notice of its intent to sentence outside the range suggested by the Guidelines post-*Booker*, as it did pre-*Booker*."). *Cf. U.S. v. Dozier*, 444 F.3d 1215, 1218 (10th Cir. 2006) ("[W]e hold today that Rule 32(h) survives *Booker* and requires a court to notify both parties of any intention to depart from the advisory sentencing guidelines as well as the basis for such a departure when the ground is not identified in the presentence report or in a party's prehearing submission.").

Note the Advisory Committee on Federal Rules of Criminal Procedure has proposed an amendment to Rule 32(h), as modified in May 2006 after public comments on the original proposal. The amended rule would take effect Dec. 1, 2007, if approved. The text of the rule as proposed would read:

> **(h) Notice of Intent to Consider Other Sentencing Factors.** Before the court may rely on a ground not identified for departure or a non-guidelines sentence either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence. The notice must specify any ground not earlier identified for departing or imposing a non-guideline sentence on which the court is contemplating imposing such a sentence.

C. Acquitted Conduct

In *U.S. v. Watts*, 117 S. Ct. 633, 635–38 (1997), the Supreme Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." After *Booker*, defendants have argued that acquitted conduct should no longer be considered, but the appellate courts have uniformly rejected those claims and found that the *Watts* holding remains in effect. *See U.S. v. Lynch*, 437 F.3d 902, 916 (9th Cir. 2005) (en banc) (per curiam) (allowing use of acquitted conduct, but requiring it be proved by clear and convincing evidence because it had a "disproportionate effect" on the sentence); *U.S. v. Vaughn*, 430 F.3d 518, 526–27 (2d Cir. 2005) (but restating that "while district courts may take into account acquitted conduct in calculating a defendant's Guidelines range, they are not required to do so"); *U.S. v. Price*, 418 F.3d 771, 788 (7th Cir. 2005) ("the Supreme Court's holding in *Watts* remains the law after *Booker*"); *U.S. v. Magallanez*, 408 F.3d 672, 684–85 (10th Cir. 2005) ("Nothing in *Booker* changes this analysis."); *U.S. v. Duncan*, 400 F.3d 1297, 1304–05 (11th Cir. 2005) ("*Booker* does not suggest that the consideration of acquitted conduct violates the Sixth Amendment as long as the judge does not impose a sentence that exceeds what is authorized by the jury verdict").

D. *Booker* Does Not Prohibit Consideration of Hearsay at Sentencing

"Both the Supreme Court and this Court . . . have consistently held that the right of confrontation does not apply to the sentencing context and does not prohibit the consideration of hearsay testimony in sentencing proceedings. . . . [Defendant] argues that we must reconsider our case law regarding the right of confrontation in the sentencing context to the extent that it conflicts with *Crawford v. Washington*, 541 U.S. 35 . . . (2004) and

United States v. Booker, 543 U.S. 220 . . . (2005). We disagree. . . . Neither *Crawford* nor *Booker* . . . addressed the applicability of the right of confrontation to the sentencing context or the admissibility of hearsay testimony at sentencing proceedings. These cases therefore provide no basis to question prior Supreme Court decisions that expressly approved the consideration of out-of-court statements at sentencing." *U.S. v. Martinez*, 413 F.3d 239, 242–44 (2d Cir. 2005) (but noting that such statements must have "some minimal indicia of reliability").

The other circuits that have addressed this issue agree. *See U.S. v. Katzopoulos*, 437 F.3d 569, 575–76 (6th Cir. 2006) ("there is nothing specific in *Blakely*, *Booker* or *Crawford* that would cause this Court to reverse its long-settled rule of law that Confrontation Clause permits the admission of testimonial hearsay evidence at sentencing proceedings"); *U.S. v. Baker*, 432 F.3d 1189, 1254 & n.68 (11th Cir. 2005) ("The recent Supreme Court decisions in . . . *Booker* and *Crawford* . . . do not affect our rule that the district court may base sentencing determinations on reliable hearsay."); *U.S. v. Brown*, 430 F.3d 942, 943–44 (8th Cir. 2005) (agreeing with *Martinez* and *Luciano*); *U.S. v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005) ("Nothing in *Crawford* requires us to alter our previous conclusion that there is no Sixth Amendment Confrontation Clause right at sentencing. *Blakely* and *Booker* do not alter this analysis."). *See also U.S. v. Grier*, 449 F.3d 558, 572 & n.6 (3d Cir. 2006) (while not specifically addressing *Crawford* and *Booker*, stating in post-*Booker* sentencing appeal that reliable hearsay is admissible at sentencing and citing *Martinez*); *U.S. v. Littlesun*, 444 F.3d 1196, 1200 & n.15 (9th Cir. 2006) (citing most of the above cases in holding that "the law on hearsay at sentencing is still what it was before *Crawford*," but not addressing *Booker*).

The Seventh Circuit agreed that "the combination of *Crawford* with . . . *Booker* . . . [does not] change the rules of evidence at sentencing," *U.S. v. Miller*, 450 F.3d 270, 273 (7th Cir. 2006), but earlier noted that it is the due process clause, not the confrontation clause, that must be satisfied, *U.S. v. Roche*, 415 F.3d 614, 618 (7th Cir. 2005).

IV. Effect of *Booker* on Other Statutes or Guidelines

The *Booker* ruling directly affected only 18 U.S.C. §§ 3553(b)(1) and 3742(e), but lower courts have had to gauge the impact of *Booker* on other statutes and Guidelines provisions.

A. 18 U.S.C. § 3553(b)(2)

The Tenth Circuit, sitting en banc, held that 18 U.S.C. § 3553(b)(2) must also be excised under *Booker*. The PROTECT Act, effective Apr. 30, 2003, amended § 3553(b) by adding new subsection (2) (part of "The Feeney Amendment"). It required that defendants convicted of specified "child crimes and sexual offenses" must be sentenced within the range calculated under the Sentencing Guidelines unless aggravating or certain mitigating factors warranted departure. In reviewing, and ultimately affirming, the sentence of a defendant convicted of sexually assaulting a juvenile, the en banc court held that § 3553(b)(2) had to be excised under *Booker*'s principles. "Section 3553(b)(2) contains the same 'shall impose' language that made application of the Guidelines mandatory under § 3553(b)(1). Because of this textual similarity, sentencing under § 3553(b)(2) raises the same Sixth Amendment concerns that the Supreme Court remedied by striking § 3553(b)(1). See *Booker*, 125 S. Ct. at 764. Accordingly, we conclude that *Booker* also

requires excising §3553(b)(2). . . . Therefore, we hold that treating the Guidelines as mandatory—regardless of whether the defendant is sentenced under § 3553(b)(1) or § 3553(b)(2)—is error." *U.S. v. Yazzie*, 407 F.3d 1139, 1145–46 (10th Cir. 2005) (en banc).

The Second and Seventh Circuits reached the same result. "We conclude that the *Booker* rationale requires us to consider subsection 3553(b)(2) to be excised. Both subsections require use of the applicable Guidelines range, subject to slightly different departure provisions, and it was the required use of the Guidelines that encountered constitutional objections in *Booker*. . . . There is no principled basis for distinguishing subsection 3553(b)(1) from 3553(b)(2) with respect to the rationale of *Booker*." *U.S. v. Selioutsky*, 409 F.3d 114, 117 (2d Cir. 2005). *Accord U.S. v. Grigg*, 442 F.3d 560, 564 (7th Cir. 2006) (agreeing with *Yazzie* and *Selioutsky*: "in light of *Booker*, we conclude that [§ 3553(b)(2)] violates the Sixth Amendment by mandating a sentence within the range recommended by the Sentencing Guidelines. It was precisely this requirement that the Supreme Court found constitutionally objectionable in *Booker*. Given the similarities between the two subsections, we believe the same objections voiced by that Court also apply to § 3553(b)(2).").

B. Mandatory Minimums and *Booker*

Every circuit to decide the issue has concluded, often with minimal discussion, that *Booker* did not change the rule that judges may not sentence below a statutory mandatory minimum sentence (except when statutory exceptions like substantial assistance or the safety valve provision apply). *See, e.g., U.S. v. Sanders*, – F.3d –, – n.2 (6th Cir. June 29, 2006) ("As Sanders was sentenced to a statutory mandatory minimum, rather than pursuant to the sentencing guidelines, we have no occasion to consider whether his sentence is affected by *United States v. Booker*."); *U.S. v. Payton*, 405 F.3d 1168, 1173 (10th Cir. 2005) (*Booker* did not change district court's obligation to impose mandatory minimum sentence); *U.S. v. Cardenas*, 405 F.3d 1046, 1048 (9th Cir. 2005) ("*Booke*r does not bear on mandatory minimums"); *U.S. v. Robinson*, 404 F.3d 850, 862 (4th Cir. 2005) ("*Booker* did nothing to alter the rule that judges cannot depart below a statutorily provided minimum sentence."); *U.S. v. Shelton*, 400 F.3d 1325, 1333 n.10 (11th Cir. 2005) (in remanding for resentencing after *Booker* error, emphasizing that "the district court was, and still is, bound by the statutory minimums"); *U.S. v. Lee*, 399 F.3d 864, 866 (7th Cir. 2005) ("Nothing in *Booke*r gives a judge any discretion to disregard a mandatory minimum.").

Some courts have also found that *Booker* did not alter the ruling in *Harris v. U.S.*, 536 U.S. 545 (2002), that judges may find facts that trigger a mandatory minimum by a preponderance of the evidence. *See, e.g., U.S. v. Dare*, 425 F.3d 634, 641 (9th Cir. 2005) ("Dare argues that the constitutional analysis in *Harris* was effectively overruled by the plurality in *Booker*. . . . We agree that *Harris* is difficult to reconcile with the Supreme Court's recent Sixth Amendment jurisprudence, but *Harris* has not been overruled."); *U.S. v. Duncan*, 413 F.3d 680, 683 (7th Cir. 2005) ("nothing in *Booker* or *Blakely* suggests that the Court reconsidered, much less overruled, its holding in *Harris*").

A Second Circuit opinion points out a wrinkle in the interaction between *Booker* and mandatory minimums. The defendant's guideline range was 108–135 months, but a 180-month mandatory minimum applied and effectively became the guideline sentence. After concluding that any *Booker* error could not result in a lower sentence for defendant be-

cause of the mandatory minimum, the court went on to say that "the analysis would be quite different if we were to consider the government's interests. Were a district court to sentence Sharpley today, it would be bound to consider the Guidelines range of 180 months and all other factors in Section 3553. . . . Its sentence would have to be reasonable in light of these factors, but could conceivably be anything between the statutory minimum of fifteen years and the statutory maximum of thirty years. . . . As a result, the district court's understandable error in using a mandatory Guidelines scheme was not necessarily harmless as to the government." *U.S. v. Sharpley*, 399 F.3d 123, 127–28 (2d Cir. 2005).

C. Sentencing Upon Remand, 18 U.S.C. § 3742(g)

In remanding a pre-*Booker* case, the Sixth Circuit offered a post-*Booker* interpretation of § 3742(g)(1), which requires that a court resentencing a defendant upon remand "shall apply the guidelines . . . that were in effect on the date of the previous sentencing of the defendant prior to appeal." The court read the statute to be consistent with *Booker* in that it merely requires a court "to consult the [prior] version of the Guidelines, the same Guidelines under which the district court originally sentenced Defendant, in calculating Defendant's Guideline range," which is now advisory rather than mandatory. *U.S. v. Williams*, 411 F.3d 675, 678 (6th Cir. 2005). *See also U.S. v. Andrews*, 447 F.3d 806, 812 at n.2 (10th Cir. 2006) (in remanding case for resentencing under *Booker*, noting that under § 3742(g) "a district court must look to the version of the sentencing guidelines in effect at the time of [defendant's] first sentencing"); *U.S. v. Bordon*, 421 F.3d 1202, 1206–07 (11th Cir. 2005) (finding that *Booker* "left intact § 3742(g)").

D. Restitution not Affected by *Booker*/*Apprendi*

Several circuits have concluded that "*Booker* does not affect restitution orders since they are not subject to any prescribed statutory maximum and they are not in the nature of a criminal penalty." *U.S. v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005). *See also U.S. v. Reifler*, 446 F.3d 65, 120 (2d Cir. 2006) (rejecting "the contentions of [defendants] that the orders requiring them to make restitution for loss amounts not admitted in their plea allocution violated their rights under the Sixth Amendment as enunciated in *Booker*"); *U.S. v. Leahy*, 438 F.3d 328, 335–38 (3d Cir. 2006) (en banc) (VWPA and MVRA authorize restitution "in the full amount of each victim's loss," effectively a "statutory maximum" that cannot be exceeded); *U.S. v. Garza*, 429 F.3d 165, 170 (5th Cir. 2005) (agreeing with other circuits that "judicial fact-finding supporting restitution orders does not violate the Sixth Amendment"); *Cf. Dohrmann v. U.S.*, 442 F.3d 1279, 1281 (11th Cir. 2006) (because § 3663 does not have a prescribed statutory maximum, *Apprendi* does not require that amount of restitution be found by jury beyond a reasonable doubt).

Other circuits have also concluded that *Booker* does not affect restitution orders. *See U.S. v. Williams*, 445 F.3d 1302, 1310–11 (11th Cir. 2006) (holding that "restitution orders are authorized by the MVRA, a statute unaffected by *Booker*"); *U.S. v. Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005) ("*Blakely* and *Booker* do not apply to restitution" because "[i]n the Tenth Circuit, restitution is not criminal punishment"); *U.S. v. Sosebee*, 419 F.3d 451, 462 (6th Cir. 2005) ("the restitution statutes function independently from the guidelines and do not rely on the guidelines for their validity. Thus, the *Booker* Court's holding that the Sentencing Guidelines are now merely advisory does not affect

orders of restitution."); *U.S. v. Bussell,* 414 F.3d 1048, 1060 (9th Cir. 2005) ("the district court's orders of restitution and costs are unaffected by the changes worked by *Booker*"); *U.S. v. George,* 403 F.3d 470, 473 (7th Cir. 2005) (extending to *Booker* previous holding that *Apprendi* does not apply to restitution).

E. Forfeiture not Affected by *Booker/Apprendi*

Several circuits have held that *Booker* does not apply to criminal forfeiture. A Second Circuit defendant claimed on appeal that the district court was required, pursuant to *Blakely* and *Booker*, to base the forfeiture amount only on conduct that was proved to the jury beyond a reasonable doubt. The appellate court rejected that claim, holding that *Blakely* and *Booker* apply only to determinate sentencing schemes to "prohibit a judicial increase in punishment beyond a previously specified range; in criminal forfeiture, there is no such previously specified range. A judge cannot exceed his constitutional authority by imposing a punishment beyond the statutory maximum if there is no statutory maximum. Criminal forfeiture is, simply put, a different animal from determinate sentencing." *U.S. v. Fruchter,* 411 F.3d 377, 382–83 (2d Cir. 2005) (also concluding that "proceeds derived from conduct forming the basis of a charge of which the defendant was acquitted can be counted as 'proceeds' of racketeering activity" in determining amount of forfeiture to extent proceeds were foreseeable to defendant).

Other circuits have similarly concluded that forfeiture proceedings are not affected by *Booker*. *See U.S. v. Alamoudi,* – F.3d – (4th Cir. June 26, 2006) ("Because no statutory or other maximum limits the amount of forfeiture, a forfeiture order can never violate *Booker*."); *U.S. v. Leahy,* 438 F.3d 328, 331–33 (3d Cir. 2006) (en banc) ("even after *Booker*, the Sixth Amendment's trial by jury protection does not apply to forfeiture"); *U.S. v. Hively,* 437 F.3d 752, 763 (8th Cir. 2006) ("Since *Booker* specifically referred to the forfeiture provision of the Sentencing Reform Act, 18 U.S.C. § 3554, . . . as 'perfectly valid,' . . . we conclude that the district court did not err by calculating the forfeiture amount"); *U.S. v. Hall,* 411 F.3d 651, 655 (6th Cir. 2005) ("absence of a statutory maximum or any sort of guidelines system indicates that forfeiture amounts to a form of indeterminate sentencing, which has never been a Sixth Amendment problem" and "we fail to see how *Booker* requires us to overturn our prior precedent in this area"); *U.S. v. Tedder,* 403 F.3d 836, 841 (7th Cir. 2005) ("the sixth amendment does not apply to forfeitures" and because there is no statutory maximum for forfeiture, *Apprendi* and *Booker* "do not alter this conclusion").

F. Criminal History

Booker specifically noted that its ruling did not apply to the fact of a prior conviction. That left intact the holding of *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998), that the fact of a prior conviction that would increase a defendant's sentence does not have to be found by a jury beyond a reasonable doubt. Nevertheless, after *Booker* defendants have argued that prior convictions that would increase their maximum punishment must be found beyond a reasonable doubt by a jury, rather than by the district court.

The appellate courts have uniformly rejected that contention. "The holding in *Almendarez-Torres* remains binding law, and nothing in *Blakely* or *Booker* holds otherwise. Thus, because we are bound by *Almendarez-Torres,* we hold that the District Court's determination regarding the facts of Ordaz's prior convictions did not violate the Sixth

Amendment, notwithstanding that the sentence was based, in part, on facts found by a judge rather than a jury." *U.S. v. Ordaz,* 398 F.3d 236, 240–41 (3d Cir. 2005). *Accord U.S. v. Carpenter,* 406 F.3d 915, 917 (7th Cir. 2005) ("Criminal history is all about prior convictions; its ascertainment therefore is an issue of law excluded by *Booker*'s own formulation and governed by *Almendarez-Torres*. . . . [A] sentencing court is entitled to classify and take into account the nature of a defendant's prior convictions, provided that the judge does not engage in factfinding about what the accused *did* (as opposed to what crime he has been convicted of)"); *U.S. v. Moore,* 401 F.3d 1220, 1224 (10th Cir. 2005) ("the *Almendarez-Torres* exception to the rule announced in *Apprendi* and extended to the Guidelines in *Booker* remains good law"); *U.S. v. Barnett,* 398 F.3d 516, 525 (6th Cir. 2005) ("there is no language in *Booker* suggesting that the Supreme Court, as part of its remedial scheme adopted in that case, intended to alter the exception to *Apprendi* allowing district courts to consider the fact and nature of prior convictions without submitting those issues to the jury"); *U.S. v. Thomas,* 398 F.3d 1058, 1063–64 (8th Cir. 2005) (*Booker* "specifically reaffirmed that holding" of *Apprendi* "that a prior felony conviction is a sentencing factor and not a separate offense and it therefore does not need to be pled in the indictment or put to a jury").

This result applies to prior convictions used as predicate offenses under the career offender guideline or the Armed Career Criminal Act (ACCA) as well as general criminal history. *See, e.g., U.S. v. Ivery,* 427 F.3d 69, 75 (1st Cir. 2005) ("The district court did not err in sentencing Ivery under the ACCA on the basis of prior convictions established by stipulation rather than jury findings."); *U.S. v. Brown,* 417 F.3d 1077, 1079 (9th Cir. 2005) ("We see no principled basis for a different rule under the career-offender provisions of the Sentencing Guidelines. . . . When the [categorical] approach is followed, the categorization of a prior conviction as a 'violent felony' or a 'crime of violence' is a legal question, not a factual question coming within the purview of *Apprendi*, *Blakely*, and *Booker*."); *U.S. v. Wilson,* 406 F.3d 1074, 1075 (8th Cir. 2005) (rejecting claim that after *Booker* "determinations of whether his prior felonies were violent offenses and whether they occurred on separate occasions should have been made by a jury under the beyond a reasonable doubt standard" before ACCA could apply); *U.S. v. Marcussen,* 403 F.3d 982, 984 (8th Cir. 2005) (neither *Booker* nor *Shepard v. U.S.,* 125 S. Ct. 1254 (2005), changed rule "that the sentencing court, not a jury, must determine whether prior convictions qualify as violent felonies" under the career offender provision).

G. Safety Valve, 18 U.S.C. § 3553(f)

The Second Circuit has rejected a claim that *Booker* should shift to the government the burden of proof that currently requires the defendant to show that he satisfies the fifth element of the safety valve requirements, that is, to truthfully provide to the government all information and evidence about the offense. "The fact that mandatory minimums have taken on increased significance after *Booker*—in that they remain binding on the district courts and work to restrain their newly acquired discretion—does not undermine our decision to place the burden of proof on the defendant to demonstrate his eligibility for safety-valve relief. The operation of the safety-valve provision does not admit to imposing on the government the burden to *dis*prove a defendant's eligibility for *relief* from a mandatory-minimum sentence. *See* 18 U.S.C. § 3553(f). Once the government has carried its burden to prove those facts which trigger imposition of a mandatory-minimum sen-

tence, the safety valve operates to impose on the defendant the burden to prove that he is eligible for relief from the mandatory-minimum sentence." The court also rejected defendant's related argument that "the Sixth Amendment requires the government to prove to a jury beyond a reasonable doubt that [defendant] is ineligible for safety-valve relief." *U.S. v. Jimenez*, – F.3d – (2d Cir. June 13, 2006). *See also U.S. v. Holguin*, 436 F.3d 111, 116–19 (2d Cir. 2006) (rejecting argument that, after *Booker*, jury rather than judge had to find facts leading to safety valve eligibility, such as whether defendant had more than one criminal history point or was a supervisor).

The First Circuit reached a similar conclusion. "The 'safety valve' provision serves to reduce a sentence below the statutory mandatory minimum sentence, and thus the burden of proof rests with the defendant to establish the five criteria set out in subsection 3553(f). . . . *Blakely*, and by extension *Booker*, expressly relate only to the constitutionality of judicial factfinding which results in sentencing enhancements, *not to sentencing reductions*," and the court could properly find that defendant possessed a firearm and was thus ineligible for the safety valve. *U.S. v. Morrisette*, 429 F.3d 318, 324–25 (1st Cir. 2005). *Accord U.S. v. Labrada-Bustamante*, 428 F.3d 1252, 1263 (9th Cir. 2005) (defendant "would have us hold that facts allowing a *decreased* sentence below that mandatory minimum must be found by a jury beyond a reasonable doubt as well. Neither *Apprendi* nor *Blakely* compels such a holding."); *U.S. v. Payton*, 405 F.3d 1168, 1173 (10th Cir. 2005) (rejecting defendant's claim that jury, not judge, should decide facts related to safety valve: "Nothing in *Booker*'s holding or reasoning suggests that judicial factfinding to determine whether a *lower* sentence than the mandatory minimum is warranted implicates a defendant's Sixth Amendment rights.")

Some courts have also rejected claims that the safety valve requirements should be considered advisory, rather than mandatory, and that district courts therefore have discretion in how to apply them. *See, e.g., U.S. v. Brehm*, 442 F.3d 1291, 1300 (11th Cir. 2006) ("*Booker* does not render application of individual guideline provisions advisory because the district court remains obligated correctly to calculate the Guidelines range pursuant to 18 U.S.C. § 3553(f)(1), . . . [and] to treat calculation of the safety-valve eligibility criteria as advisory would, in effect, excise 18 U.S.C. § 3553(f)(1)."); *U.S. v. Narvaez-Rosario*, 440 F.3d 50, 52 (1st Cir. 2006) ("*Booker* does not give a district court the discretion to disregard an otherwise applicable statutory minimum"); *U.S. v. Barrero*, 425 F.3d 154, 156–58 (2d Cir. 2005) (rejecting defendant's claim that "district court should have considered the Guidelines advisory for purposes of calculating his criminal history points" for § 3553(f)(1)).

H. Crack Cocaine 100:1 ratio

Under the Sentencing Guidelines, one gram of crack cocaine is treated as the equivalent of 100 grams of powder cocaine in calculating a defendant's offense level. The circuits have in the past denied downward departures based on the ground that the ratio is excessive or irrational, generally concluding that the differences have been adequately considered in formulating the drug guidelines. Now defendants have begun to argue that, under *Booker*, a court may find the ratio "unreasonable" because it creates an unfair, unwarranted disparity between crack and powder cocaine defendants.

In a First Circuit case, the district court rejected the 100:1 ratio as "excessive" and "not reasonable" in two different cases. For each defendant, it calculated and imposed a

sentence consistent with a 20:1 ratio, which the Sentencing Commission had recommended in a report to Congress but has not otherwise acted upon. In a consolidated appeal, the First Circuit concluded that rejecting the 100:1 ratio was legal error because it "impermissibly usurps Congress's judgment about the proper sentencing policy for cocaine offenses," and that allowing judges to individually determine what ratio to use would increase sentencing disparity. The court emphasized that the error was "the categorical substitution of a 20:1 crack-to-powder ratio for the 100:1 ratio embedded in the sentencing guidelines. . . . [W]e do not intend to diminish the discretion that, after *Booker*, district courts enjoy in sentencing matters or to suggest that, in a drug-trafficking case, the nature of the contraband and/or the severity of a projected guideline sentence may not be taken into account on a case-by-case basis." *U.S. v. Pho*, 433 F.3d 53, 62–65 (1st Cir. 2006).

The Fourth Circuit agreed with the First Circuit in finding that "sentencing courts should not be in the business of making legislative judgments concerning crack cocaine and powder cocaine," and that allowing individual judges to choose the ratio for sentencing would lead to unwarranted sentencing disparities among similarly situated defendants at odds with the directive in § 3553(a)(6). However, the court did not foreclose deviation from the advisory guideline range in an individual case: "Of course, it does not follow that *all* defendants convicted of crack cocaine offenses must receive a sentence within the advisory sentencing range. We certainly envision instances in which some of the § 3553(a) factors will warrant a variance from the advisory sentencing range in a crack cocaine case. However, a sentencing court must identify the *individual* aspects of the *defendant's case* that fit within the factors listed in 18 U.S.C. § 3553(a) and, in reliance on those findings, impose a non-Guidelines sentence that is reasonable." *U.S. v. Eura*, 440 F.3d 625, 632–34 (4th Cir. 2006). *Accord U.S. v. Miller*, 450 F.3d 270, 275 (7th Cir. 2006) (agreeing with *Eura* and *Pho* that "after *Booker* district judges are obliged to implement the 100-to-1 ratio as long as it remains part of the statute and the Guidelines").

Some defendants have claimed that the ratio is so unreasonable that district courts should factor that into the final sentence. The Seventh Circuit had to decide "not whether after *Booker* a sentencing court may use the differential as a reason to impose a shorter sentence than the one recommended by the guidelines, but rather whether it is error for a court *not* to have taken the differential into account. Given the fact that we have routinely upheld the differential against constitutional attack, including equal protection claims, . . . and, under the pre-*Booker* guideline system, rejected wholesale downward departures from the guideline on this basis, . . . it would be inconsistent to *require* the district court to give a nonguideline sentence based on the differential." *U.S. v. Gipson*, 425 F.3d 335, 337 (7th Cir. 2005). *Accord U.S. v. Cawthorn*, 429 F.3d 793, 802–03 (8th Cir. 2005) (citing *Gipson* in holding that "sentencing within the Guidelines based on the crack-powder disparity is not inherently unreasonable").

I. Federal/State Disparity Still No Reason for Lower Sentence

Sentencing courts are directed under 18 U.S.C. § 3553(a)(6) to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Before *Booker*, several circuits had held that it was improper to base a departure on the likelihood that a significantly lower sentence would have been imposed if the offense were prosecuted in state court.

At least two circuits have held that it would still be improper to base a lower sentence on this type of disparity because only disparities among federal defendants may be considered. "[W]e see nothing in *Booker* that casts doubt on our [prior decision]. Unwarranted sentencing disparities among federal defendants remains the only consideration under § 3553(a)(6)—both before and after *Booker*. . . . The District Court was neither required nor permitted under § 3553(a)(6) to consider a potential federal/state sentencing disparity" in this case. *U.S. v. Jeremiah*, 446 F.3d 805, 807–08 (8th Cir. 2006). *Accord U.S. v. Clark*, 434 F.3d 684, 687–88 (4th Cir. 2006) (remanded because court imposed lower sentence based on what state sentence would have been; incorrect to consider federal/state disparities because "[t]hese disparities are not those that section 3553(a)(6) seeks to avoid. *The sole concern of section 3553(a)(6) is with sentencing disparities among federal defendants*.").

J. Supervised Release not Affected by *Blakely/Apprendi/Booker*

Although *Booker* "significantly changed the state of federal sentencing, its effect on sentences imposed for supervised release violations is far less dramatic. The United States Sentencing Guidelines associated with supervised release violations were considered advisory even before the Court's decision in *Booker*." Thus, it was not error to consult Chapter 7 of the Guidelines in setting a sentence following revocation of supervised release. *U.S. v. Edwards*, 400 F.3d 591, 592–93 (8th Cir. 2005) (per curiam). *Accord U.S. v. Huerta-Pimentel*, 445 F.3d 1220, 1224–25 (9th Cir. 2006) ("Because the revocation of supervised release and the subsequent imposition of additional imprisonment is, and always has been fully discretionary, it is constitutional under *Booker*."); *U.S. v. Hinson*, 429 F.3d 114, 117 (5th Cir. 2005) (because Chapter 7 was advisory, "the concerns that led the Supreme Court to hold that mandatory sentencing guidelines violate the Sixth Amendment do not exist with regard to sentences imposed when supervised release is revoked"); *U.S. v. McNeil*, 415 F.3d 273, 276 (2d Cir. 2005) ("supervised release remains unaffected by *Booker*").

In addition, "the standard of review for cases where the defendant challenges the revocation of her supervised release remains the same," namely, "imposition of a sentence in excess of that recommended by the Chapter 7 policy statements of the Sentencing Guidelines will be upheld 'if it can be determined from the record to have been reasoned and reasonable.'" *U.S. v. Tedford*, 405 F.3d 1159, 1161 (10th Cir. 2005). *See also U.S. v. Cotton*, 399 F.3d 913, 916 (8th Cir. 2005) (new standard of review for reasonableness from *Booker* "is actually the same as the one" used previously to review revocation of supervised release sentences).

Before *Booker*, the Second Circuit noted, it had affirmed sentences following revocation of supervised release or probation unless the sentence was "plainly unreasonable," the standard in § 3742(e)(4). However, by excising § 3742(e), "the [Supreme] Court is fairly understood as requiring that its announced standard of reasonableness now be applied not only to review of sentences for which there are guidelines but also to review of sentences for which there are no applicable guidelines. Thus, we will review [a revocation] sentence for reasonableness." *U.S. v. Fleming*, 397 F.3d 95, 99 & n.5 (2d Cir. 2005). *Accord U.S. v. Miqbel*, 444 F.3d 1173, 1176 n.5 (9th Cir. 2006) ("We join the Second and Eighth Circuits in concluding that *Booker*'s 'reasonableness' standard has displaced the former 'plainly unreasonable' standard in the context of revocation sentencing."); *Cotton*,

399 F.3d at 916 (after *Booker*, for revocation sentences "[t]he new standard is review for unreasonableness with regard to § 3553(a)").

In finding that it did not have to decide the issue in a case where defendant's sentence met all of the standards under discussion, the Tenth Circuit stated: "As it now stands, the relationship between the abuse of discretion standard, the 'plainly unreasonable' standard and the post-*Booker* 'reasonableness' standard is less than crystal clear." *U.S. v. Rodriquez-Quintanilla*, 442 F.3d 1254, 1258 (10th Cir. 2006).

The Second Circuit has applied to revocation sentences the requirement of § 3553(c)(2), that the reasons for imposing a sentence outside of the applicable guideline range "be stated with specificity in the written order of judgment and commitment." *U.S. v. Goffi*, 446 F.3d 319, 321–22 (2d Cir. 2006) (although sentence is affirmed, "we remand solely for the court to amend its written judgment to comply with section 3553(c)(2)"). *Contra Cotton*, 399 F.3d at 915–16 (reaffirming its pre-*Booker* holding that "the written-order requirement of § 3553(c)(2) does not apply when the court revokes supervised release and imposes a sentence different from the term recommended by U.S.S.G. § 7B1.4"). *Cf. U.S. v. Lewis*, 424 F.3d 239, 245 (2d Cir. 2005) ("a court's statement of its reasons for going beyond non-binding *policy statements* in imposing a sentence after revoking a defendant's supervised release term need not be as specific as has been required when courts departed from *guidelines* that were, before *Booker*, considered to be mandatory"). Note that § 3553(a)(4)(B) states that courts shall consider "in the case of violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3)," and § 3553(c)(2) applies to a sentence that "is not of the kind, or is outside of the range, described in subsection (a)(4)."